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No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1929

ALEXANDER SPRUNT & SON, INC., ANDERSON, CLAYTON & CO., HOUSTON COMPRESS COMPANY ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ARKANSAS COTTON TRADE ASSOCIATION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS

The opinion of the specially constituted District Court (R. 131) is reported at 23 F. (2d) 874.

The reports of the Interstate Commerce Commission appear as *Application of Rates on Cotton to Gulf Ports,* 100 I. C. C. 159 and 123 I. C. C. 685. (R. 40–51; 55–79.) A related report, not repro-

duced in the record, is *Galveston Commercial Association* v. *Alabama & Vicksburg Ry. Co.*, 77 I. C. C. 388.

THE QUESTION PRESENTED

The question presented is whether an order of the Interstate Commerce Commission, requiring the removal of undue prejudice and preference resulting from the difference between the export and domestic rates on cotton from the Southwest to Gulf ports, and prescribing the manner in which the rates shall be readjusted in order to remove the undue prejudice and preference, is invalid on the alleged grounds (1) that the order is not supported by substantial evidence; (2) that it deprives appellants of the advantage of their location; (3) that it prohibits allowances by the carriers to appellants for services alleged to be transportation services; (4) that, in so far as it prescribes what the Commission deems to be a fair and reasonable readjustment of the rates for the purpose of removing the undue prejudice and preference, it is beyond the Commission's authority.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, c. 104, 24 Stat. 379, 380, as amended by Transportation Act, 1920, c. 91, 41 Stat. 456, 479, 484 (U. S. C. Title 49, Secs. 3, 15) read as follows:

> SEC. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue

or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such

case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

STATEMENT

This is an appeal under the Urgent Deficiencies Act, c. 32, 38 Stat. 208, 219 from a final decree (R. 142) of the specially-constituted District Court for the Southern District of Texas, Houston Division, dismissing, for want of equity, bills brought by appellants seeking to enjoin and set aside the Commission's order (R. 80–81).

The order is directed to practically all the railroads operating in the southwestern part of the United States, and requires that they remove "undue prejudice and preference" caused by their rate adjust-

ment on cotton from points in the states of Oklahoma, Arkansas, Texas, and western Louisiana to ports on the Gulf of Mexico.

More than half of the cotton production of the United States, and about a fourth of the world's production, is grown in the four southwestern states. (Ex. A–133.) The greater portion of the production moves to the ports of Houston, Galveston, and New Orleans. (Ex. A–189.) A part of this movement is on through export bills of lading or on domestic bills of lading marked "for export," and goes directly to the wharves for immediate transshipment, but a larger portion is consigned locally to warehouses or compresses at the ports for temporary storage or for various services. (Ex. A–189.) Except to a negligible extent, there is no consumption of cotton at the ports, for virtually all that moves thereto is sooner or later reshipped, mostly to foreign countries, although some moves by vessel in coastwise movement to the New England mills and some is reshipped by rail to the cotton mills of the southeast. (R. 685, 699, 751, 757, 763, 810.)

The rate adjustment found prejudicial and preferential was one under which two rates were in effect from any given cotton-shipping point in the four southwestern states to the Gulf ports, one an export or "ship-side" rate, the other a domestic or "city-delivery" rate. With certain exceptions, the ship-side rate was uniformly *higher* than the domestic.

The ship-side rates included switching to any wharf or pier at the ports and delivery at ship-side—in practice within 200 feet of ship's tackle. (R. 289, 389, 904.)

These rates also included a wharf or pier terminal charge equivalent to 2 cents per 100 pounds, imposed by the wharf owners, who in all instances are other than the railroads. (R. 254, 347, 455, 517.) The railroads pay this wharfage charge out of the ship-side rates, and thus the actual or net ship-side rates for the service performed by them are 2 cents per 100 pounds less than the amounts which they collect from the shippers. Hereinafter ship-side rates will be stated exclusive of the wharfage, and in referring to the difference between ship-side and city-delivery rates only the difference exclusive of the wharfage will be intended.

The city-delivery rates included switching to and delivery upon the side tracks serving any cotton warehouse or compress within the established switching limits of the port cities, which, generally speaking, embrace all the area within the city limits and the industrial district. (R. 239, 344.)

The most important rate involved in this controversy, taken as typical throughout the proceedings, is that applying to Houston and Galveston from "Texas common-point territory"—a huge blanket covering nearly the entire state of Texas beyond a radius of 210 miles from Houston. (Ex. A–88.) The ship-side rate from this territory to

Houston and Galveston was 83.5 cents per 100 pounds; the city-delivery rate, 80 cents, a difference or spread of 3.5 cents. (R. 693, 817.) The difference between the ship-side and city-delivery rates from points in Oklahoma, Arkansas and Louisiana to Houston and Galveston, was usually 3 cents per 100 pounds. (R. 693–695, Ex. A–73.)

It was the uniform practice of the carriers to assess the ship-side rates upon all cotton consigned to the ports under through export bills of lading or under domestic bills of lading marked "for export," or which, moving in under domestic bills of lading, was declared for export after arrival at the port. Upon all other cotton moving to the ports the lower city-delivery rates were assessed. (R. 199, 200, 204.)

The preponderance of the cotton moving through the Texas ports originates in Texas. Of the 6,375,302 bales delivered at Houston and Galveston during the 1924–1925 shipping season 5,229,183 bales originated in Texas. (Ex. A–189, page 2.) The movement of cotton from points in Texas to Texas ports may under some circumstances be intrastate commerce, subject to the jurisdiction of the Railroad Commission of Texas, *Atlantic Coast Line R. R. Co.* v. *Standard Oil Co.*, 275 U. S. 257, and, under other circumstances, may be interstate or foreign commerce, subject to the jurisdiction of the Interstate Commerce Commission. *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498; *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227

U. S. 111. Where the cotton moves to the port on a bill of lading showing a foreign or interstate destination, and the cotton moves through without the intervention of the owner, there is, of course, no doubt concerning the jurisdiction. But where the cotton is consigned locally to the port, the question is doubtful, depending upon whether it is the intention of the parties to ship it beyond in interstate or foreign commerce. But for the purpose of this case it is unnecessary to determine this question of jurisdiction for the reason that the domestic rates on cotton prescribed by the Railroad Commission of Texas which are applicable if the transportation is intrastate commerce are filed with the In terstate Commerce Commission and thus made equally applicable if the transportation is interstate in character. In short, the same rate is applicable whether this transportation be regarded as intrastate on the one hand, or interstate or foreign on the other. (R. 45–46, 190.) The order of the Commission is expressly restricted to "export and interstate domestic rates . . ." (R. 81.)

Cotton, after being harvested, is ginned and put in bales weighing about 525 pounds each. These bales have a density of only 11 or 12 pounds per cubic foot and are called flat or uncompressed cotton. (R. 172.) Most cotton when first tendered to the railroad for shipment is in this condition. It is the railroad's practice to stop such cotton at the first compress point along the route and have it compressed. The compression which there takes

place is usually to a density of about 22.5 pounds per cubic foot; and this is called standard compression. (R. 172.) The carriers insist upon compression in transit as a car conservation measure because compression greatly reduces the size of the bale and two or three times more compressed cotton than uncompressed cotton can be loaded into a car. (R. 70, 700.) The normal rate of the railroad includes this compression service. When cotton is tendered to a carrier for shipment in a compressed state the rate is usually 18 cents per 100 pounds lower than the normal rate. If the shipper insists upon the cotton going through uncompressed the rate is 12 cents per 100 pounds higher than the normal rate. (R. 70, 801; Ex. A–73.) All rates mentioned in this brief are the normal rates.

When cotton is to be shipped by vessel it is usually compressed to a density of about 32 pounds per cubic foot. This is known as high-density compression. The rates of the ocean vessels are usually lower on cotton compressed to a high density than to standard density, and the difference in the rate is a little more than the cost of the high-density compression. (R. 70, 221, 232, 616.) A few high-density compresses are located in the interior, but most of them at the ports. (R. 186.) No advantage is to be gained so far as the railroad rates are concerned by compressing the cotton to high density. (R. 171.)

"Concentration" is a feature of the cotton trade. Cotton ordinarily is sold to spinning mills in lots

of 100 bales, or multiples thereof. In purchasing cotton the average spinner insists that the cotton be of uniform grade and staple. As there are many grades of long-staple and short-staple cotton, it is frequently necessary to pick over many bales to find 100 of a common quality. Differences in quality arise from the condition of the plant or damage from weather or other forces. The cotton produced in any one community is not of even-running grade and staple. Consequently it is necessary that facilities be provided where cotton can be concentrated for the purpose of "merchandising," i. e., grading and assorting into lots of the quality and quantity demanded by the ultimate purchasers. (R. 69, 294, 572, 698-700.) There are thousands of points in the southwest from which cotton may be shipped. To provide facilities for the assembling of cotton at each of these numerous points would be a tremendous expense, and would not meet the requirements, as too great a time would be required in which to accumulate 100 bales of even-running grade or staple. As a matter of expediency and economy, a number of points conveniently located are selected to which the cotton moves from the various points of origin and in this way markets are provided and facilities are established for assembling, handling, protecting, and shipping cotton. (R. 699.)

Those engaged in this activity are called concentrators. There are numerous concentrators in the interior of the southwest (R. 698), and they are

herein termed "interior" concentrators. Many concentrators also are in business at the port cities. Those originally there constructed their plants upon locations back from the water front, and they are herein called "uptown" concentrators. Recently concentrators have erected facilities upon the water fronts at Galveston, Houston, and New Orleans. These cotton merchants are herein called "water-front" concentrators. All three groups are competitors, each with the other, in the buying and selling of cotton. Competition is keen and margins narrow. (R. 212, 225, 294, 298, 732.)

The concentration-in-transit privilege is one accorded by the carriers, the essential feature of which is that cotton assembled at concentration points may be reshipped to the ports at the through rate from original point of shipment. (R. 70, 225.) Concentration-in-transit, like creosoting-in-transit and other transit privileges, " rests upon the fiction that the incoming and the outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination." *Central R. R. Co.* v. *United States,* 257 U. S. 247, 257; compare *United States* v. *L. & N. R. R. Co.,* 235 U. S. 314, 324–325; *A., T. & S. F. Ry.* v. *United States,* 279 U. S. 768.

All rates involved in this case carry this privilege with them. (R. 224, 663, 787, 815; Ex. A-118.) The privilege is accorded at interior points where concentrators have their facilities; it is also accorded

to the port concentrators, both uptown and water front.

A second concentration-in-transit privilege is also permitted under all these rates, but in that event an extra charge of 3.5 cents per 100 pounds is added to the through rate. (R. 47, 664, 666, 703, 786–787.)

Prior to 1921, all the cotton warehouses, compresses and facilities at the ports were located back from the water front. There were then no water-front concentrators and there were but two competing groups, the uptown and the interior concentrators. (R. 324–325; 783–784.)

The average cost of moving the cotton from the uptown warehouses to the wharves, whether it was moved by railroad car in switching service, by dray, or by barge, was 3.5 cents per 100 pounds. In view of this fact, primarily, the railroads fixed the ship-side rate at a figure 3.5 cents per 100 pounds higher than the city-delivery rate. (R. 41, 331–332, 797.)

This adjustment was made in special reference to the situation at Galveston, for at that time the Houston Ship Channel was in its infancy and Houston had not developed as a port of importance. (R. 417–418.) In Galveston there are 15 uptown cotton warehouse and compress facilities (R. 204) and all used drays to move their cotton to the piers of the Galveston Wharf Company, the average cost of which was 3.5 cents per 100 pounds, or 18 cents a bale of 525 pounds (R. 234). A shipment of cot-

ton forwarded from any point in Texas common-point territory, e. g., McKinney, Texas, to Galveston, consigned direct to the wharf for immediate transshipment by vessel, would be charged the ship-side rate of 83.5 cents. A shipment of cotton from McKinney consigned to an *uptown* concentrator at Galveston would be charged the city-delivery rate of 80 cents. (R. 235.) When the uptown concentrator later exported that cotton he had to pay the cost of transferring it to ship-side, 3.5 cents, and this, added to the city-delivery rate of 80 cents, made his total cost of transportation to ship-side 83.5 cents (R. 235), the same as the rate paid by the interior concentrator upon his shipment forwarded direct to ship-side (R. 196–197; 233).

Obviously, if the city-delivery rate were higher than 80 cents while the ship-side rate remained 83.5 cents (the drayage charge being fixed at 3.5 cents), the uptown concentrator would have been at a disadvantage in his competition with the interior concentrator, and conversely, if the city-delivery rate were lower than 80 cents the uptown concentrator would have had an advantage and the interior concentrator would have been at a corresponding disadvantage. This practice of making the ship-side rates higher than the city-delivery rates by an amount sufficient to equalize the total transportation costs paid by the uptown and interior concentrators was approved by the Commission in *Louisiana Cotton*, 46 I. C. C. 451, decided July 11, 1917,

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and *Galveston Commercial Asso. et al.* v. *A. & V. Ry. Co.*, 77 I. C. C. 388, decided February 2, 1923.

Another factor entering into this rate situation was the intrastate rate fixed by the Railroad Commission of Texas. Its rate scale on cotton ranged from 28 cents for distances of 20 miles and less to 80 cents for distances of 211 miles and over, this latter rate being the maximum for any haul in Texas for a distance of over 211 miles. (Ex. A–88.) This 80-cent rate is the typical rate heretofore referred to. The carriers realized that the ship-side rate to the ports could not, as a practical matter, be maintained at a figure more than 3.5 cents over the Texas Commission rate, the 3.5 cents representing the drayage cost, because if the ship-side rate were more than that figure, the cotton would all move on domestic bills of lading, and at the intrastate rate. The Texas Commission rate of 80 cents, plus the 3.5-cent drayage cost, held the ship-side rate to 83.5 cents. (R. 331–332, 797.)

So long as all the warehouses and compresses at the ports remained back from the water front, the maintenance of ship-side rates higher than the city-delivery rates by an amount not more than the cost of moving the cotton from the uptown facilities to ship-side kept the interior and uptown concentrators upon a basis of transportation equality and all concerned were satisfied with the arrangement. (R. 252, 784.)

But commencing in 1921, disturbing influences were injected into the situation through the placing

of high-density compresses on the piers of the Galveston Wharf Company, followed by the erection of large warehouses and compresses on the water front at Houston. (R. 42, 174, 251–252, 254, 258.) The high-density compresses at Galveston, six in number, were constructed by the Shipside Density Compress Company, and they are located on six of the piers. (R. 175, 207–208.)

The Houston water-front facilities were erected by appellants Anderson, Clayton & Company, Weatherford, Crump & Company, and Alexander Sprunt & Son, Inc., and each formed a subsidiary compress company to operate those facilities. (These subsidiary companies, Houston Compress Company, Turning Basin Compress Company, and Ship Channel Compress Company are also appellants here.)

These plants are located upon the Houston Ship Channel virtually within reach of the ship's tackle, or, at most, only a few feet from it. (See photographs, Exs. A–62, A–63, A–129, pp. 1 and 2; R. 463, 516, 711.)

From the beginning the city-delivery rates were applied to the water-front plants upon all cotton consigned to them on domestic bills of lading not marked for export and not bearing any indication of an intention to export immediately. (R. 199–201; 710.) These plants are within the established switching limits of the port cities and the carriers followed the same practice in reference to the application of the rates on shipments consigned to them

that they followed respecting other shipments to industries within the switching limits (R. 239), which practice has already been stated.

Two of the Houston water-front plants, the Houston Compress Company (subsidiary of Anderson, Clayton & Company) and Ship Channel Compress Company (subsidiary of Alexander Sprunt & Son, Inc.) own and operate wharves which are part of the warehouse structure. (R. 463, 477, 516–517.) The situation in respect of the plant of the Houston Compress Company was taken as typical of the water-front plants and developed in detail.

This plant, known as the Long Reach Plant, consists of a warehouse, with facilities for compressing to high density, concentrating, and storing cotton, and a wharf long enough to provide berths for four ocean-going vessels. (R. 282, 464, 470, Ex. A–33.) The greater portion of the cotton it handles is that of Anderson, Clayton & Company (R. 467), but nevertheless it holds itself out as a public concentrator and warehouseman. (R. 282–283, 463, 466.) It is also engaged in a general wharf and dockage business. (R. 287, 468.)

Cotton consigned to that plant on a domestic bill of lading is charged the city-delivery rate. (R. 255.) Cotton consigned to the same plant on an export bill of lading, or on a domestic bill of lading marked for export, is charged the ship-side rate which is 3 or 3.5 cents higher than the domestic rate. (R. 224, 663, 710.)

The beginning of the proceedings before the Commission

The proceedings before the Commission in this case were commenced by one of the Houston waterfront operators—Weatherford, Crump & Company. They complained of the "two-rate" adjustment as it existed at Galveston. They were affected by that adjustment because they often shipped consignments of cotton from their Houston plant to Galveston by rail for export to a foreign country by a particular vessel berthed at Galveston.

That complaint (No. 13991) was filed June 20, 1922, and alleged that complainants merchandised or compressed cotton at their plant in Houston, and then reshipped it under concentration-in-transit provisions to Galveston for export, the through rate from original point of shipment to Galveston being applicable under the transit provisions; that such cotton moved on through export bills of lading, and that the higher export rates from original points of shipment were assessed, whereas, on cotton consigned to the compresses located on the piers at Galveston, moving under domestic bills of lading, the lower city-delivery rates were assessed. The complaint further alleged that the service rendered by the carriers in the transportation of shipments of cotton concentrated at complainants' Houston warehouse, and then forwarded on export bills of lading to Galveston was substantially similar to that afforded in the transportation of shipments from the same point of origin, consigned to the

higher than the domestic rates by an amount equal to the wharfage. In other words, the Commission found that the export and domestic rates should be equalized except for the wharfage. (R. 49.)

The Commission said that this finding was not to be construed as condemning the practice of the carriers of absorbing drayage charges in lieu of switching at the ports. (R. 49.) This matter of drayage absorption is discussed more fully hereinafter.

The reasonableness *per se* of the rates had not been in issue and the Commission said that the equality of treatment which it ordered in the rates to the Texas ports might be effected by readjustments which would preserve but not increase the carrier's revenues. (R. 49.)

The order (R. 52–53) issued with and as part of the report required that the carriers readjust their rates so as to remove the undue prejudice and preference found, but did not specify the particular rates which should be established to accomplish that result.

The rehearing

Disagreement among interested parties as to what equalized rates would meet the Commission's suggestion as to revenue maintenance resulted in the carriers being unable to publish new rates within the time specified in the Commission's order, and the Commission, upon the request of the parties, postponed its effective date. Meanwhile, in-

terests at Houston had filed petitions asking that the proceedings be reopened and broadened to cover practices pertaining to the concentration and compression of cotton at interior points. It was alleged in those petitions that subsequent to the hearings upon which the original report was predicated changes had taken place in the physical arrangement of certain warehouses and compresses at the ports and in the methods of handling cotton at those facilities and, further, that certain practices of the carriers at interior points were unduly preferential of interior compresses and warehouses and unduly prejudicial to warehouses and compresses at the ports. Petitions were also presented to the Commission by other interests asking that the proceedings be reopened. Another petition, filed by the respondent carriers, set up that compliance with the Commission's order, coupled with maintenance of existing revenues, was impossible unless the Commission's order in No. 11965, *Galveston Commercial Asso.* v. *Alabama & Vicksburg Ry. Co.*, 77 I. C. C. 388, was modified. (R. 57.)

In response to these various petitions the proceedings were reopened, the issues broadened, and they were further heard on the following questions (R. 57–58):

> (1) Whether changed conditions, or conditions which existed at the time of the previous hearings, but which had not been developed on the record, justified any modification of the Commission's finding and order;

(2) Whether the Commission's findings should be extended to apply to ports other than those covered by the Commission's prior order;

(3) What rates should be established to conform to the Commission's findings; and

(4) What services were accorded and what charges, payments, or allowances were made by respondents in connection with the handling of cotton at interior points, including payments for compression, and whether any of such services, charges, payments, or allowances, result, or might result, in unjust discrimination or undue preference or otherwise violate any provision of the Interstate Commerce Act; and what changes, if any, should be made in such services, charges, payments, or allowances.

No. 11965, *Galveston Commercial Asso.* v. *Alabama & Vicksburg Ry. Co.*, was also reopened and set down for hearing with Nos. 14940 and 13991, as to what, if any, modification should be made in the order in that case (No. 11965) to permit compliance with the Commission's findings in Nos. 14940 and 13991. (R. 57.)

Extensive further hearings were held at Houston, New Orleans, and Dallas, in April, May, and June, 1926, at which the various port and interior interests and the carriers were exhaustively heard. (R. 387–933.)

On April 4, 1927, the Commission issued its report on rehearing, *Application of Rates on Cotton to Gulf Ports*, 123 I. C. C. 685. (R. 55–79.)

The Commission adhered to its former finding that the two-rate plan was discriminatory. It said (R. 61):

> Careful consideration of the situation as developed upon the whole record convinces us of the correctness of our former findings that the existing adjustment of interstate rates on cotton to the Texas ports, from the States covered by the proceeding, gives to the water-front warehouses and compresses, and shippers using such facilities, an unnatural and unlawful preference, and subjects the uptown and interior warehouses and compresses, and shippers using such facilities, to an unnatural and unlawful disadvantage to their undue prejudice.

The Commission further found that, "for the purposes of this case, a fair and reasonable basis for equalizing the city-delivery and shipside rates will be to increase the city-delivery rates one cent per 100 pounds and reduce the shipside rates, exclusive of wharf or pier terminal charges equivalent to two cents per 100 pounds, to the basis of the increased city-delivery rates." (R. 66–67.)

The Commission further found that this basis of equalization should be applied from all of the states covered by the investigation to both the Texas and Louisiana ports, except that this finding should not be construed as condemning the practice of the lines serving New Orleans of maintaining that port on a parity with Galveston and Houston in the mat-

ter of export rates on cotton from Oklahoma and Northern Texas. (R. 64, 67.)

"Furthermore," the Commission said, "the above finding is without prejudice to further inquiry into the reasonableness of the above rates in connection with other cases now pending." (R. 67.)

The Commission further found that the regulations and practices of the carriers pertaining to the concentration and compression of cotton at interior points did not result in undue prejudice to warehouses or compresses located at the ports, or to shippers using such facilities, or to unduly prefer warehouses or compresses located at interior points, or shippers using such facilities. (R. 56, 79.)

Investigations similar to those conducted by the Interstate Commerce Commission were instituted by the Railroad Commission of Texas and the Public Service Commission of Louisiana relative to the intrastate rates in those states. When the Interstate Commerce Commision reopened its investigation the Texas Commission did likewise and the further hearings were held jointly by the two Commissions, to the end that no disparity should be brought about as between the interstate and intrastate rates. (R. 44-45; 59.)

It may be stated, merely as information, that the Texas Commission increased the intrastate rates to the Texas ports 1 cent per 100 pounds. The opinion and order of the Texas Commission are reproduced in its 36th Annual Report (1927), pages 426-429.

The order

With its report and as a part thereof, the Interstate Commerce Commission issued the order which is here in question (R. 80–81), the body of which reads as follows:

> *It appearing,* That on February 2, 1923, the Commission entered its report and order in No. 11965, and on June 23, 1925, entered its report and order in Nos. 14940 and 13991;
>
> *It further appearing,* That by order dated dated December 28, 1925, the Commission reopened the above-entitled proceedings for further hearing;
>
> *It further appearing,* That full investigation of the matters and things involved has been had, and that the Commission has, on the date hereof, made and filed a report on rehearing containing its findings of fact and conclusions thereon, which said report and the reports and orders of February 2, 1923, and June 23, 1925, are hereby referred to and made a part hereof;
>
> *And it further appearing,* That the Commission has found in said report on rehearing that the relationship between interstate rates on cotton from points on the lines of respondents and above-named defendants in Oklahoma, Arkansas, Texas, and Louisiana (on and west of the west bank of the Mississippi River) for city deliveries and shipside deliveries at Galveston, Houston, Texas City, Beaumont and Port Arthur, Tex., and New Orleans, La., including sub-port of any of said ports, is unduly preferential of ware-

houses and compresses located on the water front at such ports, and shippers using such facilities, and unduly prejudicial to warehouses and compresses located at interior points and back from the water front at the ports, and shippers using such facilities, and that the undue prejudice and preference should be removed by increasing the present city-delivery rates 1 cent per 100 pounds and reducing the shipside rates, exclusive of wharf or pier terminal charges equivalent to 2 cents per 100 pounds, to the basis of the increased city delivery rates;

It is ordered, That the said orders of February 2, 1923, in No. 11965, and of June 23, 1925, in Nos. 14940 and 13991 be, and they are hereby, modified to the extent necessary to permit of the readjustment of said rates in the manner indicated in said report.

It is further ordered, That respondents in No. 14940, named in appendix hereto, be, and they are hereby, notified and required to cease and desist, on or before June 16, 1927, and thereafter to abstain, from practicing the undue prejudice and preference found in said report to exist.

It is further ordered, That said respondents be, and they are hereby, notified and required to establish, on or before June 16, 1927, upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, in the manner indicated in said report, export and

interstate domestic rates, charges, regulations, and practices, which will remove the aforesaid undue prejudice and preference.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

The effective date of the order, June 16, 1927, was postponed by the Commission until July 16, 1927.

Proceedings in court below

July 1, 1927, bill of complaint (R. 3) was filed by the water-front interests to enjoin the Commission's order, *Alexander Sprunt & Son, Inc., et al.* v. *United States et al.,* No. 310. A bill was also filed by some of the railroads against whom the order was directed, *Texas & New Orleans Railroad Company et al.* v. *United States et al.,* No. 311, but they have not appealed. (See severances, R. 157–159.) The Manchester Terminal Corporation, which had recently constructed a water-front plant upon the Ship Channel in Houston, intervened in No. 310 in support of the bill (R. 114–116), as did also the New Orleans Joint Traffic Bureau (R. 127) and the Houston Cotton Exchange and Board of Trade (R. 129). The Arkansas Cotton Trade Association, the Texas-Oklahoma Compress Association, the Oklahoma State Cotton Exchange, the Galveston Cotton Exchange and Board of Trade, and the Galveston Chamber of Commerce intervened in opposition to the bill. (R. 83, 85, 87, 88, 96, 110.) The United States and the Inter-

state Commerce Commission answered. (R. 101, 103.)

The case was heard July 12 and 13 by the specially-constituted District Court upon the application for a temporary and permanent injunction. It was stipulated by all parties that the cause be submitted on final hearing. (R. 166.) On July 13, an order was issued granting an interlocutory injunction suspending the enforcement, operation, and execution of the order of the Commission until the further order of the court. (R. 130.)

December 5, 1927, the court rendered its opinion (R. 131–141) finding that no ground for injunctive relief existed, that the temporary injunction theretofore issued should be recalled, and that the bills should be dismissed for want of equity. Final decree was entered accordingly on the same date. (R. 142.)

Shortly thereafter, rates revised in the manner indicated in the Commission's order were made effective and have since been in force.

SUMMARY OF ARGUMENT

I. The Commission's finding of undue preference and undue prejudice is supported by substantial evidence. The line-haul service under the export rates is indistinguishable from that performed under the domestic rates, and the privileges of compression and concentration in transit granted under either are the same, as are the unloading services and allowances. The demurrage regula-

tions under the export rates are more liberal than under the domestic, but the average detention of cars containing export shipments is but little greater than the free time allowed on cars containing domestic shipments. On other export commodities such as grain, the more liberal demurrage regulations prevail, but the same line-haul rates apply on export shipments of that commodity as apply on domestic shipments to the gulf ports. On export traffic generally to the gulf ports, aside from cotton, the line-haul rates are generally the same as on domestic traffic to the ports. Generally, where domestic and export rates are different, the export rate is lower, but on cotton it is higher.

The carriers do not undertake so to expedite the movement under the export rates. There is no evidence of a tariff provision obligating the carriers to so expedite. The crop moves fast, whether it be domestic or export.

If, in particular respects there is additional expense incident to export traffic, there are offsetting economies, such as heavier car loading and less switching at the ports.

The uptown concentrator, drawing his cotton from the interior and reshipping to the wharf, must pay the higher ship-side rate, while the water-front concentrator pays only the lower city-delivery rate. The interior concentrator is subjected to a like discrimination. In the case of a second concentration the discrimination is greater.

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Carrier officials testified there was no difference in the cost of the service as between two shipments—one export, the other domestic—both delivered to a water-front facility, and they knew of no transportation reason for charging 83.5 cents on one and 80 cents on the other.

The Commission considered all the testimony of record, concluded that the service performed under the export and domestic rates was substantially the same, and found that the disparity in the rates resulted in preference and prejudice that was undue.

In making its determination the Commission properly considered all relevant transportation conditions and was not bound to base its finding solely upon comparisons of cost and value of service.

II. The Commission's finding of discrimination is based upon consideration of transportation conditions only, as is shown by the reports. The Commission rejected several contentions advanced by appellants which sought a determination upon matters not connected with the transportation.

The appellants' advantage came to them as a result of the artificial rate adjustment and not because of any natural advantage of location. The Commission, expressly disclaiming power to equalize, by means of rates, natural or commercial advantages of location, found that such a situation is not presented here. The position of appellants' plants upon the water-front does not entitle them to a better rate than their competitors, but gives

them the advantage of what is in effect a second free concentration-in-transit privilege, which the Commission did not disturb. It denied a contention that this advantage should be neutralized by granting a second free concentration at the ports to appellants' uptown competitors.

III. The ruling of the Commission with respect to allowances to port warehouses for drayage costs paid by them to the ship side when such drayage is performed in lieu of switching service which the carriers are under duty to render was proper. The expression of opinion by the Commission that the movement of cotton by the water-front facilities from the warehouses to the adjacent wharves or piers operated as a part of or in conjunction with such warehouses is not a substitute for rail transportation but is an intraplant movement for which allowances may not lawfully be made, is sound upon the facts shown. In any event, as no order on that was made by the Commission, it is not properly a subject for injunction.

IV. The order of the Commission prescribing the specific manner in which the rates should be readjusted so as to remove the discrimination found to exist is authorized by Section 15 (1) of the Interstate Commerce Act. The record before the Commission fully warranted the prescription of the rate readjustment which the Commission found reasonable to accomplish that end. No objection was noted by appellants or any other party to the proposed action. The rates found by the Commis-

sion to be "a fair and reasonable basis for equalizing the city-delivery and ship-side rates" were fixed within the spread between the ship-side and city-delivery rates previously in effect.

ARGUMENT

I

THE COMMISSION'S FINDING OF UNDUE PREFERENCE AND UNDUE PREJUDICE IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Section 3 of the Interstate Commerce Act "forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact." *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 361. The Commission's finding of this fact, when "supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law." *Virginian Ry.* v. *United States,* 272 U. S. 658, 663. "But if the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the Commission's action." *Chicago, R. I. & P. Ry. Co.* v. *U. S.,* 274 U. S. 29, 33–34, *Assigned Car Cases,* 274 U. S. 564, 580.

Under these authorities we need review the voluminous record only to the extent necessary to indicate that the Commission's finding of discrimi-

nation is supported by substantial evidence. Some of the evidence has already been adverted to, in the statement of the case.

Counsel for appellants admit the fact, clearly shown by the record, that "the line haul under export rates is indistinguishable from that performed by the carriers under local rates." (Brief, p. 3.) This admission enables us to come at once to a comparison of the privileges and allowances granted under the respective rates.

Most of the controversy centers around the concentration-in-transit privilege. But, as in the case of the line haul, the export and domestic rates are indistinguishable in this regard, for under both rates this privilege is available. (R. 597, 598, 663 et seq.; R. 224 et seq.; R. 815 et seq.; R. 787; Ex. A–118.) Cotton concentrated at an interior point may be shipped to the ports for export at the through export rate from original point of shipment. Similarly, interior concentrated cotton may be shipped to a port merchant (uptown or waterfront) at the through domestic rate. But it is not necessary that the concentration privilege be taken at an interior point; it is equally available at the ports (R. 669); in fact, the carriers make no distinction as to the point along the route where the stop may occur (R. 589, 663).

For example, cotton originating at McKinney, Van Alstyne, and other points on the Southern Pacific north of Dallas, all in Texas common-point territory, could be concentrated at Dallas and re-

shipped to Houston or Galveston at the export rate of 83½ cents. It could be concentrated at Dallas and shipped to a waterfront warehouse at Houston or Galveston at the domestic rate of 80 cents. It could be concentrated at an uptown warehouse at Houston and reshipped to a wharf at Houston at the export rate of 83½ cents. It could be concentrated at an uptown warehouse at Houston and reshipped to Galveston at the export rate of 83½ cents. It could be concentrated at a water-front warehouse at Houston and reshipped to a nonadjacent wharf at Houston at the export rate of 83½ cents. It could be concentrated at a water-front warehouse at Houston and reshipped to Galveston at the export rate of 83½ cents. It could be concentrated at an uptown warehouse at Galveston and reshipped to a wharf at Galveston at the export rate of 83½ cents. (R. 663-664.)

Under either the export or domestic rate, a second concentration in transit may be had, but in that event a charge of 3½ cents in addition to the through rate is assessed. (R. 791.)

In short, the same terms, conditions, rules, and regulations respecting concentration in transit apply under the domestic rate as under the export rate. (R. 597, 598, 663, 664.)

Appellants draw comparisons as between the services rendered upon cotton given first concentration at the uptown warehouses, on the one hand, and cotton moving to the water-front warehouses which has had interior concentration, on the other,

and argue that inasmuch as there is no evidence "of any transportational distinction between these export port concentration stops and shippers' second stops on cotton movements generally," the Commission's finding of undue prejudice is arbitrary. But the privilege of first concentration at the port is equally available to appellants. (R. 483.) It is open to them on all cotton exported from Houston over wharves other than their own (R. 68, 461, 462, 517), on all cotton reshipped by them to Galveston or New Orleans for export (R. 178, 179, 181, 348, 491, 494, 669), and on all cotton reshipped to the Carolina and other southeastern mills (R. 462, 511, 611, 902). As to all such movements appellants occupy the same relative position as the uptown concentrators. It is true that concentration increases the car loading beyond the transit point; and it is also true that this advantage to the carrier varies in degree depending upon the point along the route where the concentration takes place, and that this advantage is present, perhaps, in a smaller degree where first concentration takes place at the port. Yet the fact remains that all these cotton rates apply to "any quantity" (R. 615, 699, 808) and are applicable whether the car loading is heavy or light.

The concentration privilege was not granted by the carriers because of the increased car loading which results, but because the privilege is a commercial necessity. Carrier competition also undoubtedly played its part. The carriers granted

the privilege to the interior concentrators, wherever located, regardless of the degree of difference in the distance from their plants to the ports, and in order to avoid discrimination against the port merchants (uptown and water front) they were obliged to extend the privilege to them. (R. 806.) It was not the position of the railroads in this case that there should be a charge for first concentration at the ports. (R. 806.) The privilege was voluntarily granted by them years ago. (R. 343.) The Commission did not disturb the privilege; neither did it hold that it should be withdrawn or that it should be denied. There was no occasion for a finding of fact as to benefits accruing to the carriers from first concentration at the ports.

Under both the export and domestic rates the carriers stand the expense of unloading the cotton from the car. In the case of export shipments the carriers hire stevedores to perform this service. (R. 812.) In the case of the domestic shipments, the actual unloading is performed by the consignee and the carriers make an allowance to him of 1 cent per 100 pounds for the service. (R. 678, 835.) But the carriers will absorb unloading costs only once upon the same shipment. Upon cotton delivered to a port warehouse (either uptown or water front), the carrier will pay for the unloading, provided their rail service ends with such unloading. If a concentration privileges is taken by the port warehouse, under which the cotton is

reforwarded to ship side, the carriers will haul it to ship side, and there have it unloaded at their expense, but in that event will not absorb the unloading cost at the warehouse. (See R. 679–680, and tariff provisions, Ex. A–122, "Original Exhibits," p. 170–171.)

The compression rules and regulations apply indifferently under both rates. (R. 797.)

Thus, as to concentration in transit, unloading, and compression in transit, the two rates are indistinguishable.

Appellants lay great stress upon the greater liberality of the demurrage rules applicable on export shipments, but the average detention of cars containing export shipments is but little greater than the free time allowed on cars containing domestic shipments. (Exs. A–186; A–187; AX.)

There was evidence that although on export *grain,* for instance, 10 days free time is allowed at the ports and on domestic traffic 2 days, the *same* line-haul rates apply to both domestic and export movements of that commodity; that on export traffic generally to the Gulf ports, aside from cotton, the line-haul rates are generally the same as on domestic traffic, regardless of the fact that the export traffic has greater free time at the port; that generally where there is a difference between the domestic and export rates the export rate is the *lower,* while in the case at bar it is *higher;* that the present free time allowance for the unloading of export cotton was fixed by the Interstate Commerce Commission

after years of investigation; and that demurrage rules and charges are not considered by the carriers in fixing the level of rates on cotton. (R. 330.)

Respecting alleged expedited service under the export rates, it appears the carriers do not hold themselves out to accord it, for the record is barren of reference to any tariff publication of the carriers in which they obligate themselves to expedite such movements. Occasionally, when a shipper has reserved space on a particular vessel, he will request the carrier to expedite the movement, but if the carrier does so, it is not because of obligation (R. 242); and if he fails, he is not liable in damages in the absence of a tariff provision, even if he contracts to expedite. To agree with a particular shipper to expedite a shipment at regular rates, where no rate has been published for special expediting, is a discrimination and as such a violation of the Elkins Act of February 19, 1903, c. 708, 32 Stat. 847, and relief on the contract will be denied. *Chicago & Alton R. R. Co.* v. *Kirby,* 225 U. S. 155. It is testified that "the Texas crop moves notoriously fast to its final destination, whether it be domestic or export." (R. 648.)

If, in certain particulars, there is some additional expense to the carriers incident to the carriage of traffic moving on export bills of lading, the record indicates there were offsetting economies, one of which is that such cotton has always been concentrated in the interior. Before cotton is exported it is necessarily merchandised and merchan-

dising requires concentration. As found by the Commission (R. 70), concentration is a substantial advantage to the carriers because "it increases the car loading beyond the transit points, conserves equipment when it is in greatest demand, and thus promotes economy of operation." Another economy incident to the movement of cotton on through export bills of lading is the fact that such shipments require less switching at the ports. When a car arrives there containing several different shipments of cotton consigned to different consignees it is switched to the "mixed shipment platform," unloaded by the carrier, assorted on the platform as to consignees, reloaded into cars and switched to the warehouses of the various consignees. (R. 621–622.) Witness O'Donnell, Superintendent of Houston Terminals of the Southern Pacific lines, testified that there is three times as much switching involved in handling a car to an industry via the mixed platform as there is in handling a car direct to an industry. (R. 851–852.)

Witness Pecot, testifying for the carriers, showed that compressed cotton moving to the ports on domestic bills of lading loaded 63 bales per car on the average and that 43.5 per cent of it had to go to the mixed platforms, whereas interior concentrated cotton loaded 72 bales to the car and only 10.5 per cent of it was rehandled at the mixed platforms. (R. 620–623; Ex. A–104.) Since through export bill-of-lading cotton is cotton which has been concentrated and which usually moves in

fully loaded cars, consigned to the port for direct transshipment, it follows that comparatively few of these cars need be switched, unloaded, and reswitched to and from the mixed platforms.

There was other evidence upon which the Commission could find discrimination. The discrimination against the uptown concentrator is exemplified by the following testimony of the traffic manager of a large cotton dealer (R. 224–225):

> We concentrate most of our cotton at Houston, and Galveston, Texas; some cotton is concentrated at interior compress points. At Houston we have a compress and warehouse * * * located back from the water front. * * * At Galveston we have a large warehouse with two complete compress plants, * * * located back from the water front some little distance. The cotton we buy at interior points moves to Galveston or Houston on local bills of lading at the rate of 80¢ from Texas common points. We have compresses at both places equipped for both high density and standard compression. Cotton that is received at our plant in Houston on the 80¢ rate, must be loaded into box cars, and switched down to the docks. It costs 8¢ to get the cotton from our compress at Houston to shipside. We would get a through bill of lading and by concentration refund, we would get a refund of that 8¢ down to the 83½¢ export rate plus wharfage charge. It would thus cost

> us 83½¢ per 100 lbs. plus wharfage to get the cotton to shipside. * * *
>
> * * * Cotton moves to the Houston Compress Company on the 80¢ rate, to be shipped out from there, and if it costs us more to move our cotton to shipside than it does the Houston Compress Company, we would be at a disadvantage to that extent. The advantage would be the difference in the rate of 83½¢ which we would have to pay to get our cotton to shipside and the 80¢ rate paid by the Houston Compress Company.

The testimony of the Manager of the Transportation Bureau of the Dallas Cotton Exchange explained the discrimination in favor of the water-front concentrators, and against the uptown and interior concentrators as follows (R. 663–664):

> Under the present adjustment, the interior concentrator concentrating his cotton at Dallas, for instance, and reshipping through the Texas ports on a through export bill of lading or on a local bill of lading for export, is compelled to use the inter-state rate of 83½¢. The merchant who concentrates his cotton in a warehouse back of the water front at the port forwards his cotton from point of origin to point of concentration on the Texas intrastate rate of 80¢ and may either deliver the cotton to shipside at cost not to exceed 3½¢ or deliver it to the railroads for delivery at shipside and pay the export rate of 83½¢. In either event, the back from the water front concentrator pays

> a total of 83½¢. The concentrator who gathers his cotton together in a water front warehouse or facility at the port under the current adjustment pays the Texas intrastate rate of 80¢ from point of origin, which, under a ruling of the Texas Railroad Commission applies for local delivery at all points within the ports, including shipside warehouses. The water front concentrator, having no additional cost for delivery to shipside, therefore pays only a total rate of 80¢, giving him an advantage of 3½¢ per 100 pounds over both the concentrator in the interior and the concentrator at back of the water front facilities. It is this 3½¢ advantage that has materially reduced concentration of cotton at interior points and makes it necessary for the discrimination to be removed if the interior facilities are to survive.

In the case of a second concentration, the discrimination in favor of the water-front concentrator is even greater in some instances. (R. 664, Exs. A–117 and A–118.)

Another witness set out the extent of the discrimination in dollars and cents. (R. 673–674, Ex. A–120.)

Many other witnesses testified to the discrimination by reason of the disparity in the rates (Aston, R. 174; Gillespie, R. 179; Westbrook, R. 212; Harriss, R. 215; D. C. Reed, R. 218; Tidemann, R. 221; Toombs, R. 223; Kempner, R. 231, 233, 234; Knowles, R. 235; Thornton, R. 251, 762, 775; West,

R. 321, 323; Drewery, R. 647; Neal, R. 655; Bennett, R. 732).

The discrimination against the uptown concentrators at Houston is well illustrated by the position of the appellant Texas Farm Bureau Cotton Association. That Association handles about 10 per cent of the cotton grown in Texas (R. 58), concentrates it at an uptown warehouse in Houston, and pays the city-delivery rates to such warehouse. Prior to the creation of the water-front facilities this cotton was charged 3.5 cents additional to get to ship-side. Thereafter, owing to the advantage enjoyed by the water-front facilities under the difference between the city-delivery and ship-side rates, the uptown warehouses or compresses, in order to compete successfully with the water-front facilities, were compelled to absorb the cost of switching or draying the cotton to ship-side, thus enabling the Association to get its cotton to ship-side at the city-delivery rates. (R. 64–65, 585.) "In other words," the Commission said, "the creation of the water-front facilities, coupled with the unfair relationship between the city-delivery and shipside rates, has resulted in shifting the burden of handling the cotton from the uptown facility to shipside from the owner of the cotton to the warehouse. Were the uptown warehouse to discontinue the practice of absorbing the cost of handling the cotton to shipside the association would be compelled to pay the higher shipside rates to get its cotton to vessels, or otherwise bear the expense."

(R. 65.) Due to the fact that the Association was thus enabled to get its cotton to ship-side at the *city-delivery rates,* while other interior merchants were compelled to pay the higher *ship-side rates,* the Association opposed any increase in the city-delivery rates.

Under the carrier's interpretation and application of the tariffs, the two rates, differing by 3 or 3½ cents exclusive of wharfage, were applied on like and contemporaneous shipments delivered to the waterfront plants, depending only on the form of the bill of lading. (R. 199–200.) Carrier officials testified there was no difference in the cost of the service as between the two shipments, and that they knew of no transportation reason for charging 83.5 cents on one shipment and 80 cents on another, both of them originating at the same point and carried by the same transportation line to the ship-side facilities of appellants at Houston. (Reed, R. 834; Cummins, R. 807; Brown, R. 526.)

The evidence referred to above is only a small part of the total submitted. Other witnesses denied the existence of discrimination and submitted conflicting testimony. But the weight of the evidence was for the Commission, *United States* v. *Illinois Central R. R.,* 263 U. S. 515, 524; *New England Divisions Case,* 261 U. S. 184, 204; and the courts will not "settle the conflict nor put their judgment against that of the rate-making body," *Interstate Commerce Com'n.* v. *Louis. & Nash. R. R.,* 227 U. S. 88, 93, 98, 100; *Illinois Central R. R.* v. *Interstate*

Commerce Com'n., 206 U. S. 441, 454; *Interstate Com. Com'n.* v. *Union Pac. R. R.*, 222 U. S. 541, 547.

The case at bar is analogous in many of its aspects to the *Los Angeles Switching Case*, 234 U. S. 294, in which the Court upheld an order of the Commission which had the effect of equalizing the rate for all deliveries in the City of Los Angeles of carload freight moving in interstate commerce incidentally to a system-line haul. The Court held that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation. "Such a question is manifestly one upon which it is the province of the Commission to pass," the Court said at page 311 and at page 314:

> The argument for the petitioners necessarily invites the court to substitute its judgment for that of the Commission upon matters of fact within the Commission's province. This is not the function of the court. We cannot regard the Act to Regulate Commerce as justifying an increased or extra charge for a substantially similar service and upon the case made it cannot be said that the Commission has overstepped

its authority in forbidding the charge in question as one which was unjustly discriminatory.

In the case at bar the Commission considered the service rendered in the line-haul transportation, the switching and other terminal services performed at the ports, the unloading practices and allowances, the method and manner of compressing in transit, and the various rules and regulations in connection therewith, the intricate workings of the concentration-in-transit privileges, the matter of car loading and conservation of equipment, the history of the rates, the carriers' revenues, port and carrier competition, and a multitude of other important matters intimately connected with the transportation of the enormous cotton crop of the southwest to the various ports and its transshipment therefrom to foreign and domestic destinations.

As in the *Los Angeles Switching Case,* 234 U. S. 294, 312, the case at bar " demanded an appreciation of a variety of details, or minor facts, in order that the ultimate questions of fact could be determined."

The Commission considered all the testimony of record, concluded that the aggregates of the service performed by the carriers under the ship-side rates and under the city-delivery rates were substantially the same and that as the result of the disparity in the rates the interior and uptown shippers were subjected to *undue* prejudice and the

waterfront shippers obtained *undue* preference. *Interstate Commerce Com'n.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Com'n.* v. *D., L. & W. R. R. Co.*, 220 U. S. 235, 251; *United States* v. *Louis. & Nash. R. R. Co.*, 235 U. S. 314, 320; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *Houston & Texas Ry.* v. *United States* (*Shreveport Case*), 234 U. S. 342, 347; *Nashville Ry.* v. *Tennessee*, 262 U. S. 318, 322; *Interstate Commerce Com'n.* v. *B. & O. R. R.*, 145 U. S. 263; *Seaboard Air Line Ry.* v. *United States*, 254 U. S. 57, 62.

(a) IN DETERMINING WHETHER RATES ARE UNDULY PREFERENTIAL OR UNDULY PREJUDICIAL THE COMMISSION MAY CONSIDER ALL RELEVANT TRANSPORTATION CONDITIONS AND IS NOT BOUND TO BASE ITS FINDING SOLELY UPON COMPARISONS OF COST AND VALUE OF SERVICE.

Appellant's argument that the order for equal rates seems to be without warrant as a matter of law because the Commission "laid in its findings no basis for an equalization resting on service cost and service value" (brief, p. 45) takes for granted that the question whether undue preference and prejudice exist in a given rate adjustment is to be determined solely by consideration of those two factors. But such is not the holding of this Court. In *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 524, cited by appellants, it was expressly recognized that the Commission was not to make its find-

ing upon consideration of cost and value of the service alone. The Court said:

> To bring a difference in rates within the prohibition of section 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates can not be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, *or by other transportation conditions.* (Italics ours.)

This language immediately followed reference to *Interstate Commerce Com'n* v. *Diffenbaugh,* 222 U. S. 42, 46, holding that "the law does not attempt to equalize opportunities among localities," and *Ellis* v. *I. C. C.,* 237 U. S. 434, 445, in which it was stated that "the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference." The purpose of the language in the *Illinois Central case* seemed to be to emphasize that the question of discrimination is to be determined by consideration of transportation conditions rather than matters having nothing to do with the transportation, and cost and value of the service were mentioned as illustrative of transportation conditions properly to be considered and not as an exhaustive statement of the only matters that could lawfully enter into the determination. This is made clearer by subsequent language in the same case. On page 525, the Court said that the innocent character of the

discrimination practiced by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. "These" the Court said, "were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before Transportation Act, 1920. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 218, 220; *Interstate Commerce Commission* v. *Alabama Midland Ry.,* 168 U. S. 144, 167, 175."

In *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission, supra,* known as the *Import Rate case,* at page 219, the Court, referring to section 3 of the Interstate Commerce Act, said that "before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable." See also *Louisville & Nashville R. R.* v. *Behlmer,* 175 U. S. 648, *United States* v. *Louisville & Nashville R. R.,* 235 U. S. 314.

As stated in *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 73 Fed. 409, 419—

> Questions of this kind [unjust discrimination or undue preference] must be treated broadly and practically. The carrier's business is one which involves so many considerations, and the necessity of taking into account so many conditions, that questions of this kind do not admit of any rigidly theoretical rules in their solution.

When we turn to decisions of the Commission, we find that they are in consonance with the court holdings. In the case at bar, the Commission said (R. 75):

> The rates and charges of a railroad can not be based entirely on the cost for each particular character of service rendered. If such were the case, the passenger with baggage would pay more than the passenger without baggage, and rates to large industrial centers would vary dependent upon the character of terminal service employed, including connecting line switching. Cost of service is an important element but not the only or necessarily the controlling one by which to measure a rate or charge for a particular service.

In *Galveston Commercial Asso.* v. *G., H. & S. A. Ry. Co.*, 128 I. C. C. 349, the Commission said (p. 379):

> The fact that the law declares unlawful only discrimination that is unjust and only prejudice that is undue indicates that it was the intent to give carriers some latitude in

> fixing rates, and that distance or cost of service need not be the sole criterion by which rates shall be measured.

And in *Chamber of Commerce* v. *N. Y. C. & H. R. R. Co.*, 27 I. C. C. 238, it said (p. 242):

> Minor extra services are and should be ignored in an effort to do substantial justice to competing points.

Group or blanket rates largely ignore cost and value of the service, but they are not to be condemned on that ground alone. *Saginaw Board of Trade* v. *Grand Trunk Ry. Co.*, 17 I. C. C. 128; *Southwestern Missouri Millers Club* v. *M. K. & T. Ry. Co.*, 22 I. C. C. 422. Compare *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 518; *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 138; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 599.

Cost and value of the service are not controlling in making export or import rates. Such rates are usually lower than the corresponding domestic rates. This is because they are, in a sense, proportional rates [1] to and from the ports applicable on traffic destined to or coming from foreign countries. Since the decision in the *Import Rate Case*, 162 U. S. 197, the Commission has recognized in numerous cases the right of carriers to maintain rates on import and export traffic lower than the corresponding domestic rates to and from the ports. In *Louisiana*

[1] See *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 279 U. S. 768.

Sugar Planters' Asso. v. *Illinois Central R. R. Co.*, 31 I. C. C. 311, complaint was made because the domestic rate on molasses from New Orleans to St. Louis was 21 cents per 100 pounds while the import rate was 15 cents. Complainants insisted that as the service rendered in transporting the imported molasses was exactly the same as the service rendered in transporting the domestic article, there could be no lower rate on the import traffic. The Commission said (p. 317):

> It is now too late, however, to discuss that question, as the Supreme Court in *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, known as the *Import Rate case*, held that foreign traffic when carried from the port of entry to final destination and domestic traffic carried from the same port to the same destination are not traffic of "like kinds," and that the service in the one case is not performed under circumstances and conditions substantially similar to those under which the service rendered in the other case is performed, and that therefore the rates on the two kinds of traffic need not be the same. Following that case we have repeatedly recognized the right of carriers to maintain lower rates on import traffic than on domestic traffic, and imported goods move in large volume on special rates which are lower than the rates

charged on goods of the same kind which have not been imported.

To the same effect are *Import and Domestic Rates on Clay*, 39 I. C. C. 132, 139; *Pittsburgh Plate Glass Co.* v. *P., C., C. & St. L. Ry. Co.*, 13 I. C. C. 87; *Import and Domestic Rates*, 36 I. C. C. 389.

Opposing counsel urge that "the local and export rates that are concerned in the present controversy cover two quite different types of service." (Brief, p. 2.) If this is so, it would afford a ground, under the above authorities, for the establishment of *lower* rates on the export traffic than on the local or domestic. In the case at bar the export rate was *higher*. The Commission did not require that it be made lower than the domestic rate, but merely that it be made the same, except that on export traffic the wharfage charge might be added.

We submit, therefore, that it was unnecessary for the Commission to make a specific finding that the cost and value of the service under the export and domestic rates were exactly the same. In its original report the Commission referred to the contention that the transportation costs connected with the carriage of shipments to the ports under through export bills of lading were greater than those connected with domestic shipments to the ports, and that the value of the service to the shipper is greater, and it said (R. 47):

> The record is not convincing that differences in transportation costs will justify the

> continuance of the present difference between the export and domestic rates. Especially is this so when it is considered that differences in transportation costs have been generally disregarded in keeping the Texas ports and industries at these ports on a rate parity.

In its final report the Commission again adverted to this contention (R. 62):

> Those who are striving to have us reverse our previous finding that the rates, exclusive of wharfage charges, should be equalized, contend that the carriers are put to some greater expense in connection with the shipments delivered at shipside because of greater free time allowances and other minor incidental services. That question was discussed in our prior report and nothing developed upon further hearing or reargument convinces us that what we there said is unsound.

And in its final report the Commission said that there is little, if any, more service performed under the export rates than under the domestic, that the service performed is practically the same. (R. 61, 63, 65, 66.) This, coupled with its ultimate finding that the relation of the two rates resulted in undue preference and undue prejudice (R. 61), was sufficient.

II

The Commission's Finding of Undue Preference and Undue Prejudice is Based Solely Upon Consideration of Transportation Conditions

The contention that the whole aim of the Commission was to equalize conditions among exporters of cotton is refuted by its two reports, which show that it based its determination solely upon transportation conditions and that it rejected several contentions, advanced by the appellants herein, which sought to have it decide the question upon consideration of matters having nothing to do with the *transportation* of the cotton.

For instance, the water-front interests urged that they have expended large sums of money for the acquisition of water frontage, and that their uptown competitors had been influenced in the selection of their locations by the fact that sites are cheaper back from the water than on the water front. See original report, R. 46. Of course, the cost of plant sites can never be a proper element to be considered in adjusting transportation rates.

It was also contended before the Commission that there should be a difference in the freight rates because there was a difference in the *cost of cotton concentration* as between the interior warehouses and the water-front warehouses. This contention is explained in the original report (R. 46) as follows:

> They [the water-front facilities] further contend that merchants using interior ware-

> houses now have an advantage over merchants using the port warehouses and that this advantage would be accentuated if the present difference between the export and domestic rates was removed or narrowed. This advantage they explain as follows: Merchants using interior warehouses and shipping under through export bills of lading from these warehouses to foreign destinations pay but one merchandising charge, which amounts to about 25 cents per bale. On the other hand, merchants using the warehouses at the ports purchase a part of their cotton at the interior warehouses and then have it again merchandised at the port at an additional merchandising charge of from 50 to 65 cents per bale. A bale of cotton will weigh in the neighborhood of 500 pounds, and the port merchant therefore pays on this class of cotton from 10 to 13 cents per 100 pounds more for merchandising service than the interior merchant.

The Commission rejected this contention saying (R. 46):

> But this is purely a commercial disadvantage which can be obviated by the port merchant purchasing direct from the country buyer instead of at the interior warehouses *and has nothing to do with the transportation of cotton.* (Italics ours.)

The basis of the Commission's finding of unjust discrimination is a comparison of the *transportation* service performed by the carriers under the ship-side rates with the *transportation* service per-

formed by them under the city-delivery rates. For example, in its final report (R. 61) the Commission said:

> There is little, if any, more service performed in delivering shipments at the wharves and piers under the ship-side rates than is performed in delivering shipments at the water-front warehouses or compresses at the city-delivery rates.

This was made clear by an illustration given in the report of shipments to the plant of the Houston Compress Company, in the following language (R. 61):

> For illustration, at the water-front plant of the Houston Compress Company the wharf parallels the water front and immediately back of and paralleling the wharf are warehouses. There is a switch track on and extending the entire length of the wharf. There are also switch tracks alongside the warehouses. Cotton shipped from an interior warehouse, or ordered switched from an uptown warehouse under transit, for ship-side delivery upon the wharf at this facility, would be charged ship-side rates. But upon similar cotton, originating perhaps at the same point and handled in substantially the same manner by the carriers, delivered upon the sidetracks serving the adjacent warehouses the lower city-delivery rates would be applied. In both instances the carriers would assume the cost of unloading the cotton; in the one case from the car to the wharf and in the other from the car to the receiving platform of the warehouses.

In its original report, the Commission said (R. 48):

> Usually the same rate applies to all industries on the same road within the switching limits of a municipality, and ship-side rates, if higher than the domestic rates, are only enough higher to cover the strict wharf or pier charges, such as handling, from car to ship side, and wharfage. The rates under consideration are not so made. Rather there is a difference of 3.5 cents in the rates not accounted for by the wharf or pier charges. Unloading charges are absorbed on both domestic and export shipments.

Again, in its final report, the Commission said (R 65–66):

> * * * generally speaking, little, if any, greater service is performed by respondents in connection with the transportation of cotton from an inland point to the water front whether it be stopped in transit at an interior point for merchandising or at an uptown warehouse at the port. Respondents will transport cotton once stopped in transit for merchandising at an interior point to a water-front warehouse at the city-delivery rate, but if the cotton is merchandised at an uptown warehouse at the port, instead of at an interior point, and is then ordered to the water front under transit the ship-side rate is charged. The services rendered are practically the same in both instances.

Opposing counsel state the Commission "seemed to think that the appellants' change of location [to the water front] could justify its condemnation of what it had previously approved," and from this argue that the Commission merely sought to "equalize conditions." (Their brief, 71, 76.)

The Commission's approval of the two-rate plan was given in 1917. Prior to that date and back to 1890 the equalized rate basis had been in effect. Its history is described by witness West (R. 324–325), who also said:

> There was no objection to the correction in 1917, because it did not make any difference, since nobody was located at the waterside who could enjoy the local rate without an expense for delivery to the ship. * * * But this year a large and powerful firm decided to locate a warehouse on the waterside where the ships would and could come and take the cotton * * *. That injected a brand new factor into the situation, and made it necessary for us to take some action in reference to the discrimination and that is why we are here.

The fact that the new water-front warehouses were built did not foreclose the Commission from withdrawing its approval of the two-rate plan. But in addition to the building of the new water-front plants at Houston, Galveston, and New Orleans, other substantial changes have taken place, including the construction of new railroad tracks to serve those plants; the performance of a new transporta-

tion service by the carriers in making deliveries to them—the movement thereto of an enormous volume of cotton, all of which has had to be handled through the break-up and classification yards of the carriers at the port cities and switched to the water-front plants, resulting in material changes in the terminal conditions; the application of the city-delivery rates to those plants, and the application of the ship-side rates to the same plants on cotton sent to them for direct transshipment. These developments disrupted the conditions which gave birth to the existing relationship between the ship-side and city-delivery rates, created new competitive conditions, and brought about serious prejudice and disadvantage to uptown and interior concentrators and a corresponding preference and advantage to the water-front facilities.

(*a*) THE APPELLANTS' ADVANTAGE CAME TO THEM AS A RESULT OF THE ARTIFICIAL RATE ADJUSTMENT AND NOT BECAUSE OF ANY NATURAL ADVANTAGE OF LOCATION

Under the facts of record and the Commission's finding the position of appellants' plants upon the water front is not one that entitles them to a lower rate than their competitors. In its original report the Commmission said (R. 48):

> As contended by the water-front facilities, it is not our function arbitrarily to equalize rates in such manner as to deprive any industry of the legitimate advantage of its location.

In many previous cases the Commission had held to the same effect. In *Young* v. *C., I. & L. Ry. Co.*,

89 I. C. C. 428, 436, the Commission said: "We have consistently found that it is not our function to equalize, by means of rates, natural or commercial advantages of location." Similar expressions were made in *Wichita Business Asso.* v. *A., T. & S. F. Ry. C.*, 30 I. C. C. 45, 55; *Pacific Portland Cement Co.* v. *Director General*, 64 I. C. C. 507, 509; *Colorado Fuel & Iron Co.* v. *Director General*, 57 I. C. C. 253, 255, and others. This rule of law had been made clear by decisions of this Court. *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42, 46; *Ellis* v. *I. C. C.*, 237 U. S. 434, 445; *United States* v. *Ill. Cent. R. R.*, 263 U. S. 515, 524.

"But," the Commission said (R. 48), " we do not think that such a situation is presented here."

Thus it appears that the Commission considered and rejected, upon the facts, the contention of the appellants that equalization of the rates would deprive them of the benefit of their location. Appellants do not point out wherein their locations on the water front entitle them to a better rate than their uptown and interior competitors. The cotton originates in the interior and is shipped to the port for further transportation by water, but before reaching the ship side, it is stopped at some intermediate point for concentration, compression, or merchandising. Whether it is stopped in the interior, or at the uptown warehouses at the ports, or at the water-front facilities, the transportation service performed by the rail carriers, the Commission finds,

is practically the same, and should take the same transportation rate. Appellants are not located any nearer to the source of the supply of the cotton, and they, like the uptown and interior merchants, are merely located at an intermediate point along the route.

An industry located at a port, whether it is upon the water front, or back from the water front, has no natural advantage of location in respect of export traffic, but, under an artificial *rate adjustment*, may either enjoy an undue preference, as here, or suffer undue prejudice, as in *New York Cent. & H. R. R.* v. *Interstate Commerce Com'n.*, 168 Fed. 131. There the export rates on wheat and flour from various western points to New York were *lower* than the domestic rates. Wheat milled in transit into flour at intermediate points and shipped to New York for export was charged the lower export rate. Wheat shipped to the mill of the Hecker-Jones-Jewell Company at New York, there milled into flour and exported, was charged the higher domestic rate. The Commission upheld the contention of the miller at the port that such rate adjustment subjected him to undue prejudice and constituted a preference in favor of the interior millers, and ordered the prejudice and preference removed. The court found that the order was within the Commission's power and denied an injunction. In the case at bar the rate adjustment is the converse; the export rate to the port is higher than the domestic rate, and as a consequence the

interior concentrators are subjected to undue prejudice, and the concentrators at the port have an unlawful preference.

Another illustration of an asserted natural advantage of location, which was actually only a *rate* advantage, is the *York Switching Case, United States* v. *Pennsylvania R. R. Co.*, 266 U. S. 191. There, 17 plants located within a certain zone where each of two carriers, by contract, had trackage rights over the lines of the other, obtained the benefit of the flat rate to York. Other industries, not located within the zone, were under certain circumstances required to pay an additional charge. It was contended that any advantages which inured to the industries within the zone were the result of their natural location and were not created by the carrier. In rejecting this contention, the Commission said (*York Mfrs. Asso.* v. *P. R. R. Co.*, 73 I. C. C. 40, 45):

> From the standpoint of carriage, the situation of industries inside and outside the zone is substantially similar. They apparently form parts of one business community. The advantage of the shippers within the zone results from the contract of the carriers and not from a controlling transportation difference.

The Commission held that the arrangement resulted in undue preference of the industries within the zone and subjected the industries without the zone to undue prejudice and disadvantage.

The three-judge District Court found the Commission's order to be erroneous and enjoined it, *P. R. R. Co.* v. *United States,* 295 Fed. 523, 527, saying:

> An industry selecting a disadvantageous location for reasons justifiable to itself has no right to call upon carriers to overcome such disadvantage at their expense, and this is what the industries outside of the zone, so far as the legal situation is concerned, did.

On appeal, the action of the District Court was reversed and the order of the Commission upheld, *United States* v. *Pennsylvania R. R. Co.,* 266 U. S. 191.

The situation in the case at bar is analogous. There are several industries located in certain zones at the ports, the three in Houston being located on the Ship Channel within about a mile of the Turning Basin. They claim that by reason of their location they are entitled to a rate advantage, but the Commission finds that from the standpoint of carriage the situation of industries inside and outside the zone is substantially similar; they form parts of one business community, and the advantage of the industries within the zone results from the rate adjustment and not from a controlling transportation difference.

In the *Arbuckle Case* (*United States* v. *B. & O. R. R. Co.*), 231 U. S. 274, the plant of the Federal Sugar Refining Company was in a *disadvantageous*

location as compared with the location of the Arbuckle plant, because the plant of the former was outside the established lighterage limits of Greater New York, whereas the plant of the latter was within those limits. Switching limits are analogous to lighterage limits. In the case at bar the uptown plants are not in a disadvantageous location as compared with the water-front facilities, because all of them are within the established switching limits of the port cities. In this connection it may be noted the Commission found that (R. 48) "usually the same rate applies to all industries on the same road within the switching limits of a municipality, * * *." (Compare *Los Angeles Switching Case,* 234 U. S. 294.) And the Commission found (R. 49) "that the rates should be so adjusted that one rate will apply for all deliveries within the usual switching limits of the ports, except that the export rates should be made higher than the domestic rates by an amount equal to the wharfage charge * * *."

See also *Chi., R. I. & P. Ry. Co.* v. *Interstate Commerce Com'n.,* 171 Fed. 680, reversed, *Interstate Commerce Com'n.* v. *Chi., R. I. & P. Ry Co.,* 218 U. S. 88; *Nashville Ry.* v. *Tennessee,* 262 U. S. 318.

In the case at bar the water-front facilities had a rate advantage rather than a natural advantage, and the Commission correctly found that it was an unlawful advantage.

(*b*) THOUGH THE LOCATION OF THE APPELLANTS' PLANTS DOES NOT ENTITLE THEM TO A RATE ADVANTAGE, IT GIVES THEM THE ADVANTAGE OF WHAT IS IN EFFECT A SECOND FREE CONCENTRATION-IN-TRANSIT PRIVILEGE. THIS IS NOT DISTURBED BY THE COMMISSION

The water-front facilities, under the Commission's order, will still have an advantage over the uptown facilities in respect of concentration, and this the Commission found to be a lawful advantage derived from their location. In its final report the Commission said (R. 67):

> The tariffs of respondents authorize one free stopping-in-transit for concentration and this may be taken at an interior point or at the port. If a second stopping in transit for concentration takes place a charge of 3.5 cents per 100 pounds is assessed. As pointed out in our prior report, under the existing adjustment of rates, the warehouses at the ports secure what in effect is a second free concentration privilege. Under a one-rate plan such as herein found proper, the uptown warehouses would be deprived of this second free concentration unless the existing transit tariffs are changed. These warehouses contend that unless they are given a second free concentration they will be at a disadvantage as compared with the water-front warehouses in handling cotton previously concentrated in transit at interior points. The advantage which the water-front facility has in the handling of this class of cotton is a natural one derived from its location, and the present record will not

support a conclusion that this advantage should be neutralized by granting second free concentration in transit at the port.

Under the rates established pursuant to the Commission's order the water-front warehouses will continue to have the privilege of one free concentration-in-transit. When cotton which has had one such privilege arrives at their warehouses, they may again concentrate it and export it over their own wharves and of course the rail carriers can not assess a charge for this second transportation, because it takes place after their transportation service has ended. But under the Commission's order the uptown warehouses will be in a different position in this regard. On cotton arriving in their warehouses which has had one concentration-in-transit privilege the carriers will apply the through rate from the original point of shipment; then if the uptown warehouse reships that cotton to a wharf and files a concentration claim for protection of the through rate from original point of shipment to the wharves the carriers will add a charge of 3.5 cents per 100 pounds for the second concentration. Thus, the water-front concentrators will continue to have an advantage of 3.5 cents per 100 pounds over the uptown concentrators in respect of all cotton concentrated the second time.

From the two reports, considered as a whole, it is clear that in making its determination that the discrimination was unjust, the Commission applied

the *transportation* standard and was not influenced by matters which have no legitimate relation to the transportation.

III

The Expression in the Commission's Report in Regard to Drayage Allowances is a Correct Interpretation of the Law as Applied to the Facts Developed of Record

In its original report the Commission said that during the cotton-shipping season the grain movement is also heavy, causing cars to be in great demand, and that the carriers found it more economical to pay the shippers a drayage allowance than to use their cars for switching the cotton; and that its finding of undue prejudice and undue preference was not to be construed as condemning the practice of the carriers of absorbing drayage charges in lieu of switching. (R. 49, see also R. 247, 797, 819.) In its final report the Commission adhered to this view, pointing out that "the allowances are made only on cotton which respondents [carriers] are under obligation to transport to shipside under transit arrangements." (R. 67–68.) Upon rehearing the water-front facilities contended that, if the city-delivery and ship side rates were to be equalized, the carriers should be required "either to discontinue the drayage allowances or make allowances for handling cotton from the water-front warehouses to shipside." (R. 68.) The carriers asked the Commission "to determine whether such allowances may be made at the water-front facili-

ties, and if they may be made what they should be." (R. 68.) In response to this request the Commission expressed the following views (R. 68):

> Upon the present record, we see no reason for condemning reasonable allowances for drayage from the uptown facilities under the circumstances recited above, such drayage being a substitute for rail transportation. But such allowances must not be more than reasonable considering the benefit to respondents flowing from such substitute service, and must not be used as a cloak for unlawful preference to shippers furnishing such substitute service. Not all of the cotton handled by the water-front facilities is delivered to shipside at adjacent wharves or piers, and as to such cotton of the character referred to above as is delivered to ships at other wharves or piers, the water-front facilities occupy no different position from that of the uptown facilities, and upon such cotton respondents may properly make reasonable drayage allowances under similar circumstances. This applies equally to barging where barging is used as a substitute for switching. But upon cotton delivered to shipside from and by water-front warehouses or compresses over adjacent wharves or piers operated as a part of or in conjunction with such warehouses or compresses a different condition exists. The hand or electric trucking, or movement by overhead trolley, from the part of the water-front facility known as the warehouse or compress to that

> part known as the wharf is not a substitute for rail transportation, but is an intraplant movement just the same as the handling of cotton from the interior or (of) an uptown warehouse to the railroad car or dray is an intraplant movement. No allowances may lawfully be made for these intraplant movements.

We submit that this expression is at most merely a statement of the Commission's views, and can not properly be made a subject for injunction. Although the report is by reference made a part of the order, yet this expression of opinion, or ruling, made in the report is not mandatory, and is in fact not a part of the mandatory order. The order, in the sixth paragraph, requires the carriers to cease and desist from "practicing the undue prejudice and preference found in said report to exist," and, in the seventh paragraph, directs that the carriers shall establish and "maintain and apply, in the manner indicated in said report, export and interstate domestic rates, charges, regulations, and practices, which will remove the aforesaid undue prejudice and preference." No undue prejudice or preference was found in the report to exist by reason of the absorption or nonabsorption by the carriers of drayage charges. Hence, there is nothing in the order, or in the report, which contains any word of command, or any requirement at all, in regard to drayage allowances.

The order neither requires nor forbids the payment of drayage allowances. It would not be a violation of the order if the carriers should insist upon performing by rail movement all transportation service at the terminals which they now permit the shipper to perform by dray, and discontinue the allowances to the shippers.

The question of the legality of the actual and proposed drayage allowances arose collaterally during the course of the proceedings. It was not inappropriate that the Commission, an administrative body charged with the enforcement of the Act (see Section 12 and *I. C. C.* v. *L. & N. R. R.*, 227 U. S. 88, 93) should give the parties the benefit of its interpretation of the statute. The payment of allowances for drayage in lieu of rail movement was inaugurated by the voluntary act of the carriers, under an appropriate tariff provision published before this proceeding commenced. The order does not require that the allowances be continued; the report merely expresses the opinion that their payment is not unlawful. The carriers do not now and have not at any time either before these proceedings commenced or thereafter, paid allowances to the water-front interests for their intraplant movements. The order does not forbid such allowances; the report expresses the opinion that their payment would be unlawful.

Hence, as in *United States* v. *Los Angeles R. R.*, 273 U. S. 299, there appears to be nothing in this

regard which could be enjoined. As stated in that case, at p. 314:

> Its [the Commission's] conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction.

(Compare *American Sugar Refining Co.* v. *Delaware, L. & W. R. R. Co.*, 207 Fed. 733, 740–741 (C. C. A., 3rd), reversing 200 Fed. 652 (D. Ct., Dist. N. J.), and report of Commission, *Allowances for Transfer of Sugar*, 14 I. C. C. 619; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 480.

As to that part of the expression that allowances may not lawfully be made for intraplant movements, even if this be treated as an order it would be purely negative in character, and the courts would not disturb it, for the reasons cogently stated in *Procter & Gamble* v. *United States*, 225 U. S. 282, 292. See also *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482.

However, should the Court take a different view in this respect, we submit that the Commission's ruling is sound as a matter of law and is not arbitrary. The drayage allowances from the uptown warehouses to ship-side and from the water-front warehouses to nonadjacent wharves are made only where the carriers are under the legal duty of performing that service under their tariffs and this drayage is clearly a substitute for transportation service. But this is not the case in respect of move-

ments of cotton from the water-front warehouses to wharves which are a part of the same structure.

The facts show that this service is an intra-plant service which it is not the duty of the carriers to perform and which the water-front facilities can not in fact permit the carriers to perform, because they must do that work for themselves. The contention that the water-front facilities should have an allowance for this service was advanced by counsel for the Houston Compress Company and most of the testimony in the record related to that company's Long Reach plant.

At that plant an overhead trolley or conveyor system is in operation. It is indicated on the blue print, Exhibit A–33, by broken lines. It runs through the 10 compartments of the warehouse and out to and along the entire length of the wharf. This trolley system is used as an efficient and economical method of moving cotton from place to place in the plant. (R. 468.)

Inbound cars of cotton consigned to the plant are placed by the carrier on the switch track opposite the receiving platform at the rear of the main warehouse. The bales are unloaded and trolleyed to storage space at various parts of the warehouse. (R. 464.)

Outbound cotton, for loading on ships docked at the wharf of the plant, is trolleyed from the warehouse to the space on the wharf designated as the ship's berth. (R. 446–465, 469.) Exhibit A–33 shows the four spaces designated on the wharf as

ships' berths. Sometimes, hand trucks are used to move the cotton from a compartment of the warehouse to the wharf. (R. 476.) To illustrate how close this warehouse is to the water's edge, note the testimony that the distance from the trolley in compartment No. 3 to the trolley in *berth* No. 2—on the wharf—is approximately 50 to 55 feet. (R. 476.)

When all of the cotton which will comprise a ship's cargo has been placed on the wharf in the ship's berth the ship will issue a bill of lading, and it is thereafter responsible for the cotton. The loading of the ship is performed by the ship's labor. (R. 388–393, 400–401, 404–406, 409–413, 466–467.)

On outbound shipments by railroad the same procedure is followed; the cotton is put on the trolley in the compartment where it has been stored and trolleyed to the platform where the cars are spotted. (R. 469–473.)

Unloading of inbound-rail shipments of cotton from cars to warehouse is paid for by the carriers. (R. 487.) Loading of the outbound cotton from the ship's berth into the hold of the ship is paid for by the ship. It thus becomes obvious that the allowance from the railroad claimed by this plant is for moving the cotton from the storage compartments of the warehouse to the ship's berth on the wharf. And the evidence is clear that this service is performed by the overhead-trolley system of the plant, which is in continuous operation at all times (R. 464, 468) performing various movements necessary in the operation of the plant. It is a

service which the plant must perform for itself *and which it could not permit the carrier to perform.* This is shown by the testimony of Scott, Vice President and General Manager of the plant (R. 470):

> We do not permit the employees of the steamship company to come in to Compartments 1, 2, 3, 4, to 10, shown on Exhibit A–33, to pick up cotton and take it in to berths 1, 2, 3, and 4. We do not permit anybody to go into any of our compartments. We would not permit railroad employees to come into storage spaces 1 to 10 and take cotton and put it in berths 1 to 4. We insist on doing that ourselves. I am General Manager of the Compress Company, which includes berth spaces 1, 2, 3, and 4, as well as other parts of the facility.

This service is then, obviously an intraplant service which the railroads are under no duty to perform. It follows that there is no basis for the claim that the railroad should pay for this service.

But, opposing counsel say "if the appellants called for that service, just how the carriers could refuse it is not easy to see." (Brief, page 66.) Where the warehouse and the dock are both parts of the same structure, the carrier can not perform the service without going into the plant. The public duties of a common carrier do not include a service of that character. But even if they did, the carriers here would be precluded from performing it because the warehouse company "would not permit railroad employees" to go into the warehouse.

It is well established that a carrier can not lawfully pay a shipper for performing services not falling within the category of what the law recognizes as *transportation* services, which is another way of saying that the carrier can not make allowances to a shipper for performing any service which it is not the duty of the carrier to perform. This excludes services within the plant of the shipper.

> *General Electric Co.* v. *New York Cent. & H. R. R. Co.*, 14 I. C. C. 237;
>
> *New York Cent. & H. R. R. Co.* v. *General Electric Co.*, 219 N. Y. 227, 114 N. E. 115, Court of Appeals of New York, in which an exhaustive review of the cases is given; certiorari denied, 243 U. S. 636;
>
> *Crane Iron Works* v. *United States*, 209 Fed. 238, 242, opinion of the Commerce Court sustaining the validity of the Commissioner's order;
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> *Industrial Railways Case*, 29 I. C. C. 212, 230; 34 I. C. C. 596, 601;
>
> *National Malleable Castings Co.* v. *P. & L. E. R. R. Co.*, 51 I. C. C. 537, 542;
>
> *Tap Line Cases*, 234 U. S. 1, 23;
>
> *Los Angeles Switching Case*, 234 U. S. 294.

Opposing counsel cite the *Diffenbaugh Case* and *United States* v. *B. & O. R. R. Co., supra,* (the *Arbuckle Case*) but those cases are not authority for the payment by a railroad to a shipper for performing non-transportation services.

The contention of the appellants as advanced before the Commission was in the alternative, that either they should be granted an allowance for per-

forming the service within their plants or that the drayage allowances to the uptown warehouses should be discontinued. Should the drayage allowances to the uptown warehouses be canceled, appellants would not be benefited, because the allowances are made to the uptown warehouses only for drayage performed in lieu of switching, and the cancellation of the drayage allowances would simply have the effect of requiring the carriers to switch the cotton to the wharves. But that would not benefit the water-front facilities, nor would it injuriously affect the uptown warehouses, and the only result would be to require the carriers to withdraw the cars from the other services where they are needed and use them in this switching service, with the resulting addition to the congestion in the terminal districts.

These principles of law were applied by the Commission to the facts developed, and it is submitted that the Commission's rulings were sound.

IV

The Prescription of the Rate Readjustment to Remove the Undue Preference and Undue Prejudice Was Within the Commission's Authority Under Section 15 of the Interstate Commerce Act

The sixth paragraph of the order reads:

> *It is ordered,* That respondents in No. 14940, named in appendix hereto, be, and they are hereby, notified and required to

> cease and desist, on or before June 16, 1927, and thereafter to abstain, from practicing the undue prejudice and preference found in said report to exist.

Hereinbefore we have dealt with the attacks upon this part of the order, which, standing distinct from the rest of the order, requires removal of the discrimination. We now consider the validity of the seventh paragraph of the order prescribing the specific manner in which the removal shall be effected, reading as follows (R. 81):

> *It is further ordered,* That said respondents be, and they are hereby, notified and required to establish, on or before June 16, 1927, upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, in the manner indicated in said report, export and interstate domestic rates, charges, regulations, and practices, which will remove the aforesaid undue prejudice and preference.

The basis of the removal indicated in the report is as follows (R. 66–67):

> Upon consideration of all the facts and circumstances we are of opinion and find that, for the purpose of this case, a fair and reasonable basis for equalizing the city-delivery and ship-side rates will be to increase the the city-delivery rates 1 cent per 100 pounds and reduce the ship-side rates, exclusive of

> wharf or pier terminal charges equivalent to 2 cents per 100 pounds, to the basis of the increased city-delivery rates.

Appellants contend that the Commission is without jurisdiction "to raise the rates paid by the appellants in the absence of a valid finding after full hearing that such rates were unjustly and unreasonably low and a valid finding after full hearing that the new rates by which they were to be replaced would be just and reasonable." (Brief, page 52.)

It will be remembered that the Commission's original order (R. 53) required removal of the discrimination, but did not specify how the rates should be readjusted in order to accomplish that purpose. The Commission did suggest, however, in its report, that, inasmuch as the reasonableness of the rates had not been in issue, the readjustment should be such as would neither increase nor decrease the carriers' revenues from the cotton traffic. (R. 49.) This gave the carriers the privilege of readjusting the rates themselves, but instead of doing so they evidently attempted to reach an agreement with the shippers, and, failing that, "invoked the Commission's aid upon the point." (See opinion of court below, R. 141.)

The Commission reopened the proceedings for the purpose of further hearing upon four questions, one of which was:

> What rates shall be established to conform to our findings? (Final report, R. 57–58.)

At the further hearing the carriers serving the Texas ports contended that the rate equalization in order to remove the discrimination should be effected by increasing the city-delivery rates 3 cents per 100 pounds and reducing the ship-side rates, exclusive of wharfage, to the level of the increased city-delivery rates. (R. 64.) This would have resulted in an increase of the Texas common-point rate from 80 to 83 cents for city deliveries and a reduction in the rate from that territory for ship-side delivery of 0.5 cents, from 83.5 to 83 cents, exclusive of wharfage.

For the reasons stated in the report (R. 64–66), the Commission did not approve the carriers' proposed method of equalization, and permitted an increase in the city-delivery rate of only 1 cent, instead of the 3 cents proposed.

This was primarily a section 3 case. The principal question litigated before the Commission was the relation of the ship-side and city-delivery rates. There was no complaint that either of those rates, standing alone, was too high or too low. As stated in the report (R. 65), "the reasonableness of the *level* of the rates is not in issue." The purpose of the order is to remove the discrimination.

As stated in *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624:

> Proceedings to remove unjust discrimination are aimed directly only at the *relation of rates*. (Court's italics.)

In *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S. 263, at page 277, the Court said:

> * * * a charge may be perfectly reasonable under section 1 and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3.

And in the latter case the Court cited with approval the following from the English case of *Great Western Railway Co.* v. *Sutton*, L. R. 4 H. L. 226, 239:

> When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances.

The question is, then, may the Commission in a Section 3 case, in which the reasonableness of the level of the relative rates under Section 1 has not been investigated, prescribe the specific manner in which the rates shall be readjusted to remove the discrimination? We think that this authority is vested in the Commission under the enlarged jurisdiction conferred by Transportation Act, 1920, which among other things, amended Section 15 (1) of the Interstate Commerce Act so as to authorize the Commission to prescribe specific rates; and this power is not restricted to cases in which the Commission finds a rate to be unreasonable per se, in

violation of Section 1, but under the express provisions of the section the power may also be exercised where the Commission finds a rate to be unjustly discriminatory, in volation of section 2, or unduly preferential or prejudicial, in violation of section 3, or otherwise in violation of any provision of the Act.

The Commission has so interpreted the amended Act. In *Arkansas Shippers & Mfgrs. Asso.* v. *Director General,* 59 I. C. C. 662, 669, the Commission said:

> Prior to the amendments made in the transportation act, 1920, our orders requiring the removal of unjust discrimination or undue prejudice have usually afforded to carriers the choice of three alternative modes of compliance. They could reduce the higher rate to the level of the lower, increase the lower to the level of the higher, or place both upon some other common level. The interstate commerce act now in force empowers us to prescribe either the exact rate or the maximum or minimum, or maximum and minimum, to be charged in such case, and to make an order that the carriers shall not thereafter publish, demand, or collect any rate other than the rates prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be.

In the case at bar the record before the Commission fully warranted the prescription of the specific manner in which the rates should be revised in order to remove the undue prejudice. The question

as to what the specific rates should be in order to comply with the Commission's findings was assigned as one of the four questions to be taken up upon rehearing, and all parties to the proceeding, railroads and the uptown, interior, and water-front interests, all appeared and submitted evidence upon that issue. In passing it may be noted that no objection was registered by any party to the proposed action. As said by the court below (R. 141):

> We are further of the opinion that in view of the proceedings before the Commission, in which all parties participated under an order stating as one of the purposes of the hearing the arriving at a rate which would remove the discrimination found, petitioners having participated in that hearing without objection or contest, and the carrier plaintiffs, having in fact invoked the Commission's aid upon the point, are in no position now to seek injunctive relief against the named rate, but should, if the rate is deemed not just and reasonable per se, pursue their remedy before the Commission in appropriate proceedings available to them for that purpose.

In *United States* v. *Ill. Cent. R. R.*, 263 U. S. 515, the Commission found the rate from Knoxo, Miss., a point on an independent branch line, to be unjustly discriminatory against a shipper there, in violation of section 3, because it was 2 cents per 100 pounds higher than the rate from Fernwood, Miss., the junction point between the branch line and the Illi-

nois Central, and from other points in the blanket territory. In its opinion at page 524 the Court said:

> But the mere fact that the Knoxo rate is inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice.

The Court also said, at page 521:

> The order leaves the carriers free to remove the discrimination either by making the Knoxo rate as low as that from Fernwood, or by raising the rate from Fernwood, or by giving both an intermediate rate.

Of particular significance is the holding that the Fernwood rate might be increased in order to remove the discrimination, *though that rate had not been shown to be unreasonably low.* As a matter of fact, there was no finding whatever by the Commission upon the reasonableness, either because too high or too low, of the Fernwood rate, as examination of the report of the Commission will show. *Swift Lumber Co.* v. *Fernwood & Gulf R. R. Co.*, 61 I. C. C. 485. Despite that absence of a finding upon the reasonableness of the Fernwood rate the Court said it could be increased to remove the discrimination.

The analogy between that case and the present case is clear. Here the Commission found that the

relation between the export rate and the domestic rate resulted in undue prejudice to certain cotton shippers and concentrators and undue preference of certain competitive cotton shippers and concentrators. That discrimination could be removed (1) by making the export rate as low as the domestic rate or (2) by raising the domestic rate to the level of the export rate or (3) by reducing the one and raising the other to a common level. The Commission, after exhaustive study of the situation and upon an exceptionally full record, concluded that the discrimination should be removed by adopting the third alternative, and to that end ordered that the export rate should be reduced, and the domestic rate should be increased to a common level. In order to do this, as plainly indicated by the *Illinois Central case,* it was not necessary for it to find that the export rate was unreasonably high *per se,* or that the domestic rate was unreasonably low *per se.* (Compare *United States* v. *Merchants Asso.,* 242 U. S. 178.)

Many of the rates involved in this proceeding had been prescribed in *Galveston Commercial Asso.* v. *Alabama & Vicksburg Ry. Co.,* 77 I. C. C. 388. In that case the Commission fixed domestic rates at a figure 5 cents lower than the export rates. In the case at bar it was found that by reason of the spread of 5 cents between the export and domestic rates undue preference and prejudice resulted, and,

as previously stated, the Commission reopened the *Galveston Commercial Asso. Case* and assigned it for further hearing in connection with these proceedings for the purpose of ascertaining what modification should be made in the order in that case to permit compliance with the first order herein. In prescribing the manner in which these rates should be readjusted in order to remove the discrimination the Commission did not go higher than the export rates nor lower than the domestic rates prescribed in the *Galveston Commercial Asso. Case,* but fixed a rate within the spread between those rates, no complaint having been made by any party to the proceedings that the level of the rates there prescribed was unreasonable.

The court below held that (R. 140)—

> a fair construction of the words "just and reasonable" as used in the context above quoted [Section 15 (1)] permits the conclusion that in a discrimination case under section 3 such as this is, it is only necessary that the rate fixed upon to remove the discrimination be found to be just and reasonable for that purpose, and that it is not necessary that it be found just and reasonable per se.

We submit that this holding is sound.

CONCLUSION

The decree of the court below dismissing the bill for want of equity should be affirmed.

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